UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DANIEL P. NELSON, Acting Regional Director of
Region 13 of the National Labor
Relations Board, for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellee,

v. **No. 17-2755**

ADVOCATE HEALTH AND
HOSPITALS CORPORATION
d/b/a Advocate Medical Group,

Respondent-Appellant.

NATIONAL LABOR RELATIONS BOARD'S OPPOSITION TO ADVOCATE'S MOTION TO EXPEDITE APPEAL

Petitioner-Appellee Daniel P. Nelson, Acting Regional Director of Region 13 ("the Director"), on behalf of the National Labor Relations Board (the "Board"), opposes the motion of Respondent-Appellant Advocate Health and Hospitals Corporation d/b/a Advocate Medical Group ("Advocate") to expedite Advocate's appeal from an order of the U.S. District Court for the Northern District of Illinois granting the Director a temporary injunction under § 10(j) of the National Labor Relations Act ("the Act"), 29 U.S.C. 160(j).

The injunction requires Advocate, as a successor employer, to recognize and bargain with the Illinois Nurses Association (the "Union") as the exclusive

collective-bargaining representative of approximately 143 Advance Practice Nurses ("APNs") employed by Advocate in its Clinics inside Walgreens stores throughout Illinois who had been represented by the Union since 2011 under the predecessor employer.

Advocate raises no valid reasons for expediting the appeal of this order. This Court should deny Advocate's motion and keep the adequately prompt briefing schedule already set by the Court.

1. **The Appeal is not Mooted by the Decision of the Administrative Law Judge**

Advocate claims that expedition is necessary because the appeal becomes moot with the issuance of the decision of the Administrative Law Judge ("ALJ") in the underlying administrative case. (Mot. Exp. 3.)[1] Advocate is plainly wrong. The ALJ decision, which recently issued on September 11, 2017, is an interim, not final, decision that is subject to review by the Board. 29 C.F.R.§§102.45-102.46 (2017). The parties have 28 days to file exceptions to the ALJ's decision; 14 days to file a response to exceptions and another 14days to file a reply to any response. 29 C.F.R. §102.46 (2017). Only then will the administrative case be ready for review by the Board.

[1] "Mot. Exp." references are to Advocate's Motion to Expedite Appeal file on September 6, 2017. "Op." references are to the district court's August 11, 2017 Memorandum Opinion and Order containing its findings of fact and conclusions in favor of injunctive relief. "Or. Denying Stay" refers to the district court's August 31, 2017 denial of Advocate's requested stay pending appeal.

It is well-established that § 10(j) injunctive relief is intended to be "effective from the date issued by the district court until *the Board* adjudicates the underlying unfair labor practice case," not until the ALJ's interim decision. *Ohr v. Latino Express, Inc.*, 776 F.3d 469, 479 (7th Cir. 2015) (citing *Harrell v. American Red Cross*, 714 F.3d 553, 556 (7th Cir. 2013)) (emphasis added). *See also Barbour v. Central Cartage, Inc.*, 583.F.2d 335, 337 (7th Cir. 1978); *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1136 (10th Cir. 2000) (ALJ decision is "not self-enforcing, ... 10(j) injunction will continue until the Board issues its final order"); *Kobell v. United Paperworkers Int'l Union,* 965 F.2d 1401, 1411 (6th Cir. 1992).The ALJ decision does not render moot Advocate's appeal. *Frye v. Specialty Envelope*, 10 F.3d 1221, 1224 n. 1 (6th Cir. 1993).

This appeal will be fully briefed in approximately two months, before the end of November 2017, under the Court's current schedule. The administrative case will likely not be fully briefed before the Board until around the same time. Once the case is fully briefed before the Board, and because the district court has issued an injunction, the Board gives the case expedited consideration. 29 C.F.R.§ 102.46 (2017). Nevertheless, a final Board decision may come many months or years after the ALJ's decision, given the Board's caseload. Courts, including this one, have therefore repeatedly granted or affirmed §10(j) injunctions even well after issuance of an ALJ decision in the underlying case. *See, e.g.*, *Harrell*, 714

F.3d at 556; *Lineback v. Spurlino Materials, LLC*, 546 F.3d 491, 502 (7th Cir. 2008); *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 288 (7th Cir. 2001).

Thus, it is highly unlikely that a final Board decision will issue and render the case moot before this Court can consider Advocate's appeal. The recent issuance of the ALJ's decision does not require expedition of the appeal.

2. Advocate Will Not Suffer Irreparable Harm from the Injunction Absent Expedition

Advocate raises in its Motion to Expedite the same meritless claim of harm that the district court correctly twice rejected, in its decision granting the injunction and its order denying Advocate's motion for a stay pending appeal. (Op. 17-18; Or. Denying Stay 4.)

As the district court correctly concluded, the injunction poses no risk of harm to Advocate. Contrary to Advocate's contention, the court's interim bargaining order will not force it "to stand by the fruit of those negotiations" that take place under the temporary injunction order. (Mot. Exp. 5.) As discussed in the Director's Opposition to Advocate's Motion for Stay (filed concurrently with this Opposition), the parties can always condition any agreements reached under the injunction on the Board finding Advocate subject to a bargaining obligation and issuing a final bargaining order. *See Kaynard v. Palby Lingerie, Inc.*, 625 F.2d at 1054 ; *Asseo v. Pan American Grain*, 805 F.2d 23, 28 (1st Cir. 1986). Thus,

Advocate *can* be put "back in the position it would have been had it prevailed" in district court. (Mot. Exp. 5.)

The fact that the injunction subjects Advocate to a theoretical risk of contempt is not a basis for relieving it of its bargaining obligation and, therefore, is no cause for expediting the appeal. Any respondent subject to a § 10(j) injunction "is theoretically subjected to the risk" of contempt sanctions. *NLRB v. Electro-Voice*, 83 F.3d 1559, 1573 (7th Cir. 1996). Under Advocate's rationale, any appeal of an order subjecting an appellant to affirmative or negative obligations would require expedition.

3. An Expedited Briefing Schedule Would Impose Hardship on the Director

Given the Board's internal organization, the Director has different counsel on appeal than in district court. On appeal, the Director is represented by attorneys from the Injunction Litigation Branch in the Office of the General Counsel. The undersigned, Laura T. Vazquez, and Assistant General Counsel Elinor L. Merberg are counsel of record in this appeal. They will be joined shortly by a staff attorney who is new to the case, was not involved in the district court litigation, and will need to become familiar with the record and issues in order to adequately brief the case. Ms. Vazquez and Ms. Merberg, moreover, are also supervising counsel of record in several other appeals, including one with a brief due on October 2, 2017,

another one with an oral argument on October 12, 2017, which the undersigned will be presenting, and a third with an oral argument on October 26. Accordingly, Advocate's proposed expedited schedule, which would have counsel for the Director filing their answering brief in approximately 23 days from today, on October 6, conflicts with the Director's counsel's other appellate cases and deprives them of adequate time to prepare the Director's answering brief.

For these reasons, this Court should deny Advocate's Motion to Expedite the Appeal and instead retain the briefing schedule already set.

Respectfully submitted,

s/ Laura T. Vazquez
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September 13, 2017
Washington, DC

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This motion response contains 1,166 words and therefore complies with the type-volume limitation of 5,200 words set forth in Fed. R. App. P. 27(d)(2)(A).

2. This motion response complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E) because it was prepared using Microsoft Office Word 2013 in proportionally spaced, 14-point Times New Roman.

/s/Laura T. Vazquez
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Washington, D.C.
September 13, 2017

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ADVOCATE HEALTH AND
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DECLARATION

I, Laura T. Vazquez, hereby state as follows:

1. I am supervising counsel of record for Petitioner-Appellee National Labor Relations Board, along with Assistant General Counsel Elinor L. Merberg.

2. We will be joined as counsel of record by a staff attorney recently assigned to the case who was not involved in the underlying district court litigation and is not familiar with the record below.

3. Ms. Merberg and I are also supervising several other §10(j) matters in U.S. Courts of Appeal in the following cases: *McKinney v. Ozburn-Hessey Logistics*, 15-5211 (6th Cir.); *Paulsen v. PrimeFlight Aviation Services*, 16-3877, 17-8 (2d Cir.); *Henderson v. Greenbrier VMC & Bluefield Hosp.*, 16-2331, 16-

2332 (4th Cir.); *Kinard v. Dish Network Corp.*, 17-10282 (5th Cir.); *Murphy v. Cayuga Med. Ctr.*, 17-0837 (2d Cir.); and *Overstreet v. IGT*, 17-16592 (9th Cir.).

4. Scheduled in these cases at this time are a reply brief due on October 2, 2017 in *Kinard v. Dish Network Corp.*, 17-10282 (5th Cir.), oral argument on October 12, 2017 in *McKinney v. Ozburn-Hessey Logistics*, 15-5211 (6th Cir.); and oral argument on October 25, 2017 in *Henderson v. Greenbrier VMC & Bluefield Hosp.*, 16-2331, 16-2332 (4th Cir.).

5. Respondent-Appellant Advocate Health proposes an expedited schedule with the Board's answering brief due only 23 days from now, on October 6, between the Board's reply brief in *Dish Network* and oral argument in *Ozburn-Hessey Logistics*. This expedited schedule creates conflicts with the undersigned's and Ms. Merberg's obligations in these other appeals and leaves insufficient time for Board counsel to prepare for any of these matters.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Respectfully submitted,

s/Laura T. Vazquez
National Labor Relations Board
1015Half Street SE
Washington, D.C. 20570

Washington, D.C.
September 13, 2017

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2017, I electronically filed the foregoing Opposition to Motion to Expedite Appeal and supporting Declaration with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Respectfully submitted,

/s/ Laura T. Vazquez

Washington, D.C.
September 13, 2017